# STATE OF MICHIGAN

# COURT OF APPEALS

| | |
|---|---|
| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>April 10, 2014 |
| v | No. 314772<br>Ingham Circuit Court |
| CHRISTOPHER DONIQUE WILLIAMS,<br><br>Defendant-Appellant. | LC No. 12-000159-FH |

Before: STEPHENS, P.J., and SAAD and BOONSTRA, JJ.

PER CURIAM.

Defendant appeals his jury conviction of: (1) domestic violence, MCL 750.81a; (2) carrying a concealed weapon (CCW), MCL 750.227; (3) felon in possession of a firearm (felon in possession), MCL 750.224f; and (4) possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. For the reasons stated below, we affirm defendant's conviction and sentence, but remand to correct a computational error the trial court made when it calculated defendant's minimum state costs.

## I. FACTS AND PROCEDURAL HISTORY

Defendant's conviction arises out of a confrontation with his then-girlfriend, Latoya, on January 30, 2012. That night, Latoya witnessed defendant leaving his former girlfriend's house, which led to an argument between Latoya and defendant. After breaking up with defendant, Latoya continued to exchange angry text messages with him, and she went to a bar with her friend.

While at the bar, Latoya answered a call from defendant's sister and told the sister her location. Defendant then got on the phone and informed Latoya he was angry. Soon after, he arrived at the bar and got in an altercation with Latoya. Defendant apparently struck her, prompting Latoya and her friend to throw numerous objects at him. According to three other bar patrons who testified at trial, defendant then pulled out a gun. Numerous witnesses at trial stated that they then heard a gunshot, or a noise that sounded like a gunshot. The police arrived at the scene shortly after the incident, and one of the responding officers testified that he saw a bullet hole in the front door of the bar that appeared as if it was fired from a gun with "a caliber larger than a .177."

The jury convicted defendant of domestic violence, CCW, felon in possession, and felony firearm. He appealed the case to our Court and makes the following assertions: (1) there is insufficient evidence to sustain his conviction of CCW, felon in possession, and felony firearm; (2) the trial court erroneously scored OV 10 at ten points; (3) his trial counsel was ineffective; (4) the prosecutor engaged in misconduct at trial; (5) his conviction of CCW, felon in possession, and felony firearm violates the prohibition against double jeopardy; and (6) the trial court wrongly calculated his minimum state costs. The prosecution says that the trial court should be affirmed on all counts, save for the minimum state costs, which it agrees should be slightly reduced.

## II. ANALYSIS

### A. SUFFICIENCY OF THE EVIDENCE

Claims of insufficient evidence are reviewed de novo. *People v Jones*, 297 Mich App 80, 86; 823 NW2d 312 (2012). The evidence is viewed in a light most favorable to the prosecution "to determine whether the evidence would justify a rational jury's finding that the defendant was guilty beyond a reasonable doubt." *People v McGhee*, 268 Mich App 600, 622; 709 NW2d 595 (2005). All conflicts in evidence are resolved in favor of the prosecution,[1] and we "draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

Here, defendant wrongly asserts that the prosecution showed no competent evidence from which a jury could infer that he used a firearm when he committed the offense. As noted, the people actually submitted considerable evidence that defendant used a firearm: several eyewitnesses testified that they saw defendant in possession of a firearm. One bar patron testified that she "looked back and . . . saw a gun" in defendant's hand, and added that she noticed "the shine" from the butt of the gun. She was "certain" she saw defendant holding a gun. Her male companion testified that he got within ten feet of defendant, and observed defendant "reach into his waistband and pull out a firearm" with his right hand. This eyewitness had "no doubt at all" that defendant pulled out a gun. A bar employee also stated she saw defendant "pull something out of his pocket that [she] thought was a [black] gun." And all these witnesses testified that they heard the sound of gunfire, and one testified that defendant ran out of the bar after the gunshot. In addition, a police officer testified that he saw a bullet hole in the bar's front door, made by a weapon with a caliber larger than .177—which means that the weapon in question is a "firearm" per MCL 8.3t and 750.222(d).

From this evidence, a jury could easily conclude that defendant used a firearm (or a "loaded or unloaded firearm that by its construction and appearance conceals itself as a firearm")[2] in his commission of the crime. Defendant's firearm-based convictions are thus supported by sufficient evidence.

---

[1] *People v Ericksen*, 288 Mich App 192, 196; 793 NW2d 120 (2010).

[2] MCL 750.222(e).

## B. SCORING OF OV 10

Because defendant challenges the scoring of OV 10 for the first time on appeal, this issue is not preserved. MCL 769.34(10); MCR 6.429(C); *Jones*, 297 Mich App at 83. Unpreserved claims are reviewed for plain error affecting the defendant's substantial rights. *People v Carines*, 460 Mich 750, 763–764; 597 NW2d 130 (1999). A plain error affects a defendant's substantial rights if the error affected the outcome of the proceedings. *People v Vaughn*, 491 Mich 642, 665; 821 NW2d 288 (2012).

OV 10 addresses the exploitation of a vulnerable victim. MCL 777.40(1). Ten points are assessed where "the offender exploited a victim's physical disability, mental disability, youth or agedness, or a *domestic relationship*, or the offender abused his or her authority status." MCL 777.40(1)(b) (emphasis added). "Exploit" is defined as "to manipulate a victim for selfish or unethical purposes." MCL 777.40(3)(b). Defendant does not dispute that he and Latoya had a domestic relationship. At issue is whether defendant exploited that relationship, by using it to manipulate her for selfish or unethical purposes.

The trial court reasonably concluded that defendant did so. As noted, Latoya took a call from defendant's sister and told defendant's sister her location. Defendant then immediately came on the phone and said "[h]e was mad." Latoya also testified that their relationship made defendant familiar with her habits and regular hangouts—information he would not have known had the two not been in a domestic relationship. And the domestic relationship was the ultimate basis for defendant and Latoya's dispute—in other words, it was the reason defendant committed the crimes. Accordingly, the trial court did not err when it assessed ten points for defendant's conduct under OV 10.

## C. EFFECTIVE ASSISTANCE OF COUNSEL[3]

Effective assistance of counsel is presumed and a defendant claiming ineffective assistance is required to overcome a strong presumption that sound trial strategy motivated counsel's conduct. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005); *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Failure to raise a meritless objection does not constitute ineffective assistance of counsel. *Snider*, 239 Mich App at 425.

[3] A claim of ineffective assistance of counsel should be presented to the trial court in a motion for new trial or an evidentiary hearing if there are facts not of record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). In the absence of a motion for new trial or an evidentiary hearing, as is the case here, review is limited to the existing record. *People v Thomas*, 260 Mich App 450, 456; 678 NW2d 631 (2004).

In this case, defendant argues that he was denied his right to the effective assistance of counsel when counsel did not object to: (1) the supposed lack of evidence that defendant possessed a firearm; (2) the trial court's scoring of OV 10; and (3) Latoya's appearance before the trial court in jail attire. As noted, defendant's assertions that the evidence is insufficient to sustain his firearm-related convictions and that the trial court incorrectly scored OV 10 are without merit. Accordingly, his trial attorney was not ineffective for choosing not to raise these meritless issues.

Defendant's claim regarding Latoya's clothing at trial is equally unavailing. He makes no attempt to explain why such an objection would have had merit, much less explain how it would have changed the outcome of his trial. In fact, Latoya's unfortunate attire might have even helped defendant—she was the prosecution's witness, and it might have been sound trial strategy to allow her to appear in prison fatigues. In any event, the prosecutor addressed Latoya's clothing, calling it the "elephant in the room," and the court allowed her to explain that she was in jail for a "DUI/DWI." Because such an offense does not necessarily implicate a person's honesty or credibility, the fact that the jury saw her in prison clothes probably had no impact on the outcome of the trial.

As such, we reject defendant's claims that his trial counsel gave him ineffective assistance.

## D. PROSECUTORIAL MISCONDUCT[4]

Our Court reviews "claims of prosecutorial misconduct case by case, examining the remarks in context, to determine whether the defendant received a fair and impartial trial." *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). The propriety of a prosecutor's conduct depends on all the facts of the case. *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). The remarks must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Brown*, 279 Mich App 116, 135; 755 NW2d 664 (2008). "Although a prosecutor may not argue facts not in evidence or mischaracterize the evidence presented, the prosecutor may argue reasonable inferences from the evidence." *Watson*, 245 Mich at 588. Reversal is not required if the prejudicial effects of an improper prosecutorial comment could have been cured by a timely jury instruction. *Id*. at 586. The prejudicial effects of most improper prosecutorial statements can be cured by such an instruction, and jurors are presumed to follow their instructions. *Unger*, 278 Mich App at 235–236.

[4] A defendant must raise a timely and specific objection in the trial court in order to preserve the issue of prosecutorial misconduct on appeal. *People v Unger*, 278 Mich App 210, 234-235; 749 NW2d 272 (2008). As defendant did not object to any of the alleged instances of prosecutorial misconduct, the issue is unpreserved and reviewed for plain error. *Carines*, 460 Mich at 763-764. (Defendant does not argue that defense counsel rendered ineffective assistance by failing to object to these alleged instances of prosecutorial misconduct.)

Here, defendant claims that the prosecutor committed misconduct when he: (1) stated that one witness remained in the courtroom after testifying; and (2) noted that defendant writing with his right hand, which would be consistent with witness testimony that he drew the gun with his right hand.[5]

Both of defendant's assertions are unavailing. Although the prosecution admits that the prosecutor's statement about the witness's continued presence in the courtroom "was not a part of the record evidence and therefore a technical error," it properly observes that our Court distinguishes between "prosecutorial misconduct"—i.e., "instances where a prosecutor's conduct actually violates the rules of professional conduct"—and the sorts of "technical or inadvertent error[s] at trial," which are more accurately labeled "'prosecutorial error,' with only the most extreme cases rising to the level of 'prosecutorial misconduct.'" *People v McCrary*, unpublished opinion per curiam of the Court of Appeals, issued June 13, 2013 (Docket No. 308237). As to the prosecutor's remark on defendant's right-handedness, authorities are split on whether it is proper for a prosecutor "to comment on a nontestifying defendant's in-court demeanor or conduct. . ." *People v Smith*, unpublished opinion per curiam of the Court of Appeals, issued July 8, 2010 (Docket No. 288595) (noting split of authorities on that topic).

In any event, reversal is not required because any prejudicial effects of the comments were negated by the trial court's instructions to the jury that the lawyers' statements and arguments were not evidence that could be considered during deliberations. "It is well established that jurors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). The critical issue at trial was whether defendant had a gun, not which hand he used to hold it, and two witnesses were certain that defendant had a gun in his hand.[6]

## E. MINIMUM STATE COSTS[7]

---

[5] Defendant also wrongly asserts that the prosecutor asked an impermissible leading question when he asked the police officer witness: "Is this the size—or the hole in the window, was that the size of a regular traditional bullet or something smaller like a BB?" This is not a leading question, because it does not suggest an answer. See Black's Law Dictionary (9th ed), p 969 (defining "leading question" as "[a] question that suggests the answer to the person interrogated; esp., a question that may be answered by a mere "yes" or "no").

[6] As defendant did not receive ineffective assistance of counsel, and there was no prosecutorial misconduct, defendant's argument that he deserves a new trial is without merit.

[7] Defendant makes the frivolous assertion that his felon-in-possession and felony-firearm convictions violated the prohibition against double jeopardy. In fact, the Michigan Supreme Court rejected this exact argument, and explained that: "Because the felon in possession charge is not one of the felony exceptions in the statute, it is clear that defendant could constitutionally be given cumulative punishments when charged and convicted of both felon in possession, MCL 750.224f, and felony-firearm, MCL 750.227b." *People v Calloway*, 469 Mich 448, 452; 671 NW2d 733 (2003).

MCL 769.1j states, in pertinent part:

> [I]f the court orders a person convicted of an offense to pay any combination of a fine, costs, or applicable assessments, the court shall order that the person pay costs of not less than the following amount, as applicable:
>
> (a) $68.00, if the defendant is convicted of a felony.
>
> (b) $50.00, if the defendant is convicted of a misdemeanor or ordinance violation.

At sentencing, the court stated that defendant "needs to pay $68 state costs" and "$130 crime victim assessment." Defendant's judgment of sentence lists $272 for "state minimum" and $130 for "crime victim" for a total of $402. It thus appears that defendant was assessed minimum state costs for 4 felonies, when he was not convicted of four felonies but of three felonies and one misdemeanor. Defendant should have been assessed $254 in minimum state costs.

## III. CONCLUSION

We affirm defendant's conviction and sentence, but remand to the trial court to correct the computational error it made when it imposed defendant's minimum state costs. We do not retain jurisdiction.

/s/ Cynthia D. Stephens
/s/ Henry William Saad
/s/ Mark T. Boonstra